2010 WL 10878488 (Idaho Dist.) (Trial Motion, Memorandum and Affidavit)
Idaho District Court.
Ada County

Reed J. TAYLOR,
v.
Richard A. RILEY, et al.

No. CVOC0918868.
February 19, 2010.

Oral Argument Requested

Plaintiff Reed J. Taylor's Memorandum of Law in Opposition to Defendants Turnbow, Riley and Eberle Berlin's Motion for Summary Judgment and Cross Motion for Summary Judgment

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Plaintiff Reed J. Taylor ("*Reed Taylor*"), by and through his attorneys of record, Campbell, Bissell & Kirby, PLLC, submits the following Memorandum of Law in Opposition to Robert M. Turnbow ("*Turnbow*"), Richard A. Riley ("*Riley* "), Eberle, Berlin, Kading, Turnbow & McKlveen, Chartered's ("*Eberle Berlin* ") Motion for Summary Judgment and Cross Motion for Summary Judgment:

I. INTRODUCTION

Eberle Berlin, Riley and Tumbow have moved for summary judgment apparently believing that they do not owe Reed Taylor any obligations for any of the legal services and representations they provided to him and AIA Services. Under their flawed rationale, an attorney can commit malpractice, make false representations, and commit other torts without regard to the people they directly represent and impact. However, like Hawley Troxell and Riley's Motion for Summary Judgment, Turnbow, Eberle Berlin and Riley's Motion for Summary Judgment fails as a matter of law and summary judgment should be entered in favor of Reed Taylor of all issues presented.

II. LEGAL AUTHORITY AND ARGUMENTS

Reed Taylor incorporates by reference into each and every argument asserted below all of the facts set forth in Reed Taylor's Statement Facts in Opposition to Defendants' Motions for Summary Judgment and in Support of Cross Motions for Summary Judgment ("*Facts*").

A. Summary judgement standard for Eberle Berlin and Turnbow.

When deciding a motion for summary judgment, the court must liberally construe all disputed facts in favor of the nonmoving party, and all reasonable inferences that can be drawn from the record will be drawn in favor of the nonmoving party. *Cristo Viene Pentecostal Church v. Paz,* 144 Idaho 304, 307, 160 P.3d 743 (2007). Summary judgment is improper "if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented." *McPhheters v. Maile,* 138 Idaho 391, 394, 64 P.3d 317 (2003).

When a party moves for summary judgment based upon an affirmative defense, the party asserting the defense bears "the burden of demonstrating the absence of a genuine issue of fact material to...[the] defense." *Mason v. Tucker and Associates,* 125 Idaho 429, 437, 871 P.2d 846 (Ct. App. 1994). The party seeking summary judgment on the basis of an affirmative defense must conclusively prove all elements of the defense. *Franklin v. J.O. Jackson,* 847 S.W.2d 306, 308 (Tex. Ct. App. 1993). The defendants have failed to meet their burden.

B. Summary judgment standard for Reed Taylor.

Summary judgment is proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P.56(c).

> Once the moving party has provided sufficient evidence to support the motion, the party against whom a motion for summary judgment is sought may not merely rest on allegations contained in the pleadings, but must come forward and produce evidence by way of deposition or affidavit to contradict the assertions of the moving party and establish a genuine issue of material fact.

Post v. Idaho Farmway, Inc., 135 Idaho 475, 478, 20 P.3d 11, 14 (2001) (citing I.R.C.P. 56(e); *McCoy v. Lyons,* 120 Idaho 765, 770, 820 P.2d 360, 365 (1991)). *"Such evidence must consist of specific facts, and cannot be conclusory or based on hearsay." Id.* (emphasis added).

> The moving party is entitled to judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial.

Thomas v. Medical Center Physicians, P.A., 138 Idaho 200, 205, 61 P.3d 557, 562 (2002) (citing *Celotex v. Catrett,* 477 U.S. 317, 106 S.Ct. 254, 91 L.Ed.2d 265 (1986)). Reed Taylor has met the required burden and partial summary judgment should be granted in his favor.

C. Eberle Berlin. Riley and Turnbow owed Reed Taylor duties.

The defendants assert that they owed no duties to Reed Taylor and had no attorney-client relationship with him in 1995, however, they do not dispute that they drafted and delivered the Opinion Letter to Reed Taylor.

When an attorney delivers an opinion to a third party at the request of his client, privity is established as a matter of law. Finova Capital Corporation v. Berger, 18 A.D.3d 256, 257 (N.Y. 2005); *RTC Mortgage Trust 1994 N-1 v. Fidelity National Title Insurance Company,* 58 F.Supp.2d 503, 521 (D. N.J. 1999). When a lawyer represents that he is acting on the third party's behalf, the attorney is estopped from denying the attorney-client relationship and may be held liable for breach of fiduciary duty or negligence. *Crossland Savings Bank FSB v. Rockwood Insurance Company,* 700 F. Supp. 1274 (N.Y. 1988); *Cohen v. Godfriend,* 665 F.Supp. 152,158 (E.D. N.Y. 1987).

Despite the defendants arguments addressed below, as a matter of law, Reed Taylor had privity with Eberle Berlin, Riley and Turnbow, and they owed him duties which were breached when the district court found the redemption agreements to be illegal and unenforceable on June 17, 2009. N (Facts, §§D, E and L.)

1. Eberle Berlin, Riley and Turnbow committed malpractice against their client Reed Taylor.

In order to establish a claim for professional negligence, the plaintiff must show:

> (1) the existence of an attorney-client relationship; (2) the existence of a duty on the part of the lawyer; (3) the failure to perform that duty; and (4) the failure to perform the duty must be a proximate cause of the injuries suffered by the client.

J-U-B Engineers, Inc. v. Security Insurance Company of Hartford, 146 Idaho 311, 317, 193 P.3d 858 (2008).

Here, defendants assert that they had no attorney-client relationship with Reed Taylor, while he asserts that he did have an attorney-client relationship. It is at least undisputed that Riley and Eberle Berlin (and other attorneys at Eberle Berlin) were Reed Taylor's personal attorneys from the 1980's through the early 1990's. They also don't deny or dispute Reed Taylor's testimony that they were restructuring AIA Services on his behalf. (Facts, §E.) The restructuring of AIA Services continued well past 1991, the year that Riley and Eberle Berlin assert their attorney-client relationship with Reed Taylor ended. It is noteworthy that Riley does not dispute obtaining a conflict waiver from Reed Taylor in the early 2000's. (2/2/10 Taylor Aff, ¶15.) Defendants also spend significant time discussing the termination of their attorney-client relationship with Reed Taylor, yet they have submitted no proof other than their affidavit testimony. Thus, at the very least, the issue of Reed Taylor's relationship with Riley and Eberle Berlin is an issue of fact which precludes granting summary judgment in favor of the defendants.

However, as mentioned above, privity is established as a matter of law under the facts and circumstances in this action. (Facts, §D, E and H.) At the very least, Reed Taylor is entitled to partial summary judgment finding that, as a matter of law, he has privity with the defendants.

2. Eberle Berlin, Riley and Turnbow committed malpractice against Reed Taylor, a third-party beneficiary of the redemption representation and the majority shareholder of AIA Services.

Attorneys may also be liable for malpractice to intended third-party beneficiaries. *Beaty v. Hertzberg & Golden, P.C.*, 571 N.W.2d 716 (Mich. 1997); *Walco Investments, Inc. v. Thenen*, 881 F.Supp. 1576 (D.C. Florida 1995). The issuance of legal opinion intended to secure a benefit for a client, either monetary or otherwise, must be issued with due care, and attorneys who do not act carefully will have breached the duty owed to those they attempted or expected to influence. *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*, 128 Cal.Rptr. 901, 906 (Cal. 1976). Attorneys may also be liable for malpractice/negligence to non-clients. Davin, L.L.C. v. Daham, 746 A.2d 1034 (N.J. 2000); *RTC Mortgage Trust 1994 N-1 v. Fidelity National Title Insurance Company*, 58 F.Supp.2d 503 (D.C. N.J. 1999); *Lloyd v. Walters*, 277 S.E.2d 888 (S. Carolina 1981). In certain factual circumstances, which are present in this action, attorneys owe duties to nonclients and the nonclients may pursue claims against them for malpractice and negligence:

> In addition to the other possible bases of civil liability described in §§ 49, 55, and 56, a lawyer is civilly liable for professional negligence to a person to whom the lawyer owes a duty of care within the meaning of § 50 or § 51, if the lawyer fails to exercise care within the meaning of § 52 and if that failure is a legal cause of injury within the meaning of § 53, unless the lawyer has a defense within the meaning of § 54.

Restatement (Third) of The Law Governing Lawyers § 48 (2009).

For purposes of liability under § 48, a lawyer owes a duty to use care within the meaning of § 52 in each of the following circumstances:

(1) to a prospective client, as stated in § 15;

(2) to a nonclient when and to the extent that:
(a) the lawyer or (with the lawyer's acquiescence) the lawyer's client invites the nonclient to rely on the lawyer's opinion or provision of other legal services, and the nonclient so relies; and

(b) the nonclient is not, under applicable torot law, too remote from the lawyer to be entitled to protection;

(3) to a nonclient when and to the extent that:
(a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient;

(b) such a duty would not significantly impair the lawyer's performance of obligations to the client;and

(c) the absence of such a duty would make enforcement of those obligations to the client unlikely.

Restatement (Third) of The Law Governing Lawyers § 51 (2009).

In 1995, the clear intent of all parties was to ensure that Reed Taylor's shares were redeemed legally. (Facts, §§A-F.) Eberle Berlin, Riley and Turnbow's legal representations and services were intended to benefit all parties to ensure the redemption was legal and enforceable. In addition, AIA Services agreed to provide Reed Taylor the Opinion Letter through an express contract provision. (Facts, §D; 11/24/09 Riley, Aff., Ex. A, p. 4, §2.4(j).) There was but one purpose for Eberle Berlin, Riley and Turnbow's legal representation and that was to take all steps to ensure the redemption agreements did not violate any laws and that the transaction was properly approved by the shareholders. (Facts, §§A-F.) These facts, coupled with the Opinion Letter being drafted and delivered for Reed Taylor to rely upon, makes clear that Reed Taylor has third-party beneficiary rights to pursue negligence and malpractice claims against Riley, Turnbow and Eberle Berlin, and they are liable to him, as a matter of law, for their negligence and malpractice. (*Id.;* 12/3/09 Babbitt Aff., Ex. J; Facts, §§D, E and L.)

3. Riley, Turnbow and Eberle Berlin have committed malpractice based upon their obligations to Reed Taylor by and through the Stock Redemption Agreement.

Reed Taylor incorporates by reference all of the legal authority in Sections 1 and 2 above into this Section. Reed Taylor was provided a third-party beneficiary based upon the contract provision in the Stock Redemption Agreement obligating the defendants to draft and deliver Reed Taylor an Opinion Letter. (11/24/09 Riley Aff., A, p. 4, §2.5(j).) It is noteworthy that the defendants never take a shred of responsibility for their actions in any of their voluminous filings. On page 15 of their Memorandum, they assert, without explanation how their actions truly benefitted the corporation in 1995. Moreover, an explanation is not provided how they actually did proceed in the best interests of the corporation. As an observation, one must question who the defendants were really representing in 1995.

Regardless, Reed Taylor had an express contract provision that granted him rights to be represented by the defendants. Now the defendants assert, for their own self-serving interests, that the contract provision and Opinion Letter were not worth the paper they were printed on and that they should obtain summary judgment on the claim. The court should deny their Motion for Summary Judgment and enter summary judgment in favor of Reed Taylor.

4. Reed Taylor's derivative claims are asserted as direct claims as the majority shareholder and the only person entitled to all the damages.

Shareholders may also pursue derivative claims for malpractice. *Schulman v. Wolf & Samson, PC,* 951 A.2d 1051 (N.J. 2008). However, a shareholder may bring a derivative action directly against parties if he can show distinct damages only applicable to him. *Steelman v. Mallory,* 110 Idaho 510, 716 P.2d 1282 (1986).

> An action brought by a shareholder is derivative if the gravamen of the complaint is the injury to the corporation or to the whole body of its stock or property and not injury to the plaintiff's individual interest as a shareholder.

McCann v. McCann, 138 Idaho 228, 233, 61 P.3d 585 (2002).

A shareholder may sue directly for harm to himself or herself that is separate and distinct from that suffered by the corporation.

Under some authority, the analysis for determining whether a stockholder's action should be classified as direct or derivative turns on the determination of who suffered the alleged harm, the corporation or the suing stockholder individually, and who would receive the benefit of recovery or other remedy. ***Most courts hold, however, that a shareholder may have standing to bring an action arising from an injury to the corporation if the injury is the result of the violation of duty owed directly to the shareholder, or if the shareholder sustains an injury that is peculiar to him or her alone, and does not fall alike upon other stockholders,*** even if the corporation was similarly harmed.

When a shareholder's complaint states a cause of action that is both direct and derivative, the shareholder may proceed with the direct action.

18 C.J.S. Corporations § 485 (2008) (internal citations omitted) (emphasis added).

On July 18, 1995, Reed Taylor was the majority shareholder in AIA Services. (Facts, §§A-C.) On August 15, 1995, Eberle Berlin, Riley and Turnbow provided Reed Taylor the Opinion Letter. (2/2/10 Taylor Aff., Ex. A-B; Facts, § D.) However, the transaction to redeem Reed Taylor's shares did not close until days after the Opinion Letter was provided to him. (Facts, §D.) When the shareholders approved the redemption of Reed Taylor's shares, they voted 926,698.07 shares in favor of the redemption and 6,688.09 shares against the redemption. (Facts, §C.) Because the Opinion Letter was drafted and delivered to Reed Taylor before is shares were redeemed and he relied upon it when he closed the transaction, he is the only shareholder entitled to any damages recovered as the illegality only affected the value of his shares and sums he was required to receive for his shares. Thus, Reed Taylor can pursue his derivative claims directly against the defendants because the claims are distinct and personal to him only and he is entitled to all recovered damages.

Even though Reed Taylor is asserting the derivative claims directly against AIA Services by way of the claims being distinct to him and only his shares, in an abundance of caution he pled certain malpractice claims derivatively and asserted that making a demand upon the board would be futile. (*See* Complaint, ¶¶30-31.) Contrary to the defendants' assertions, [1] Idaho recognizes the futility exception to a derivative action. *Orrock v. Appleton,* 147 Idaho 613, 213 P.3d 398, 399 (2009) ("A derivative action may not be maintained unless the plaintiff can show that demand would be futile."). Nevertheless, as stated in *McCann,* claims are not derivative if the gravamen of the complaint is injury to the corporation's assets. *McCann,* 138 Idaho at 233. Reed Taylor's claims are not based at all upon injury to AIA Services, but are exclusively based upon the damages incurred by him when he was a shareholder.

Accordingly, Reed Taylor's derivative malpractice claim that he is pursuing directly against AIA Services is appropriate and warranted under the facts and circumstances in this case. The court should deny defendants' Motion for Summary Judgment and enter judgment in favor of Reed Taylor on this claim, as asserted in his Motion for Partial Summary Judgment.

D. Reed Taylor's malpractice claims are not barred by I.C. §5-219(4)

A cause of action against an attorney does not accrue until some damage has occurred. *City of McCall v. Buxton*, 146 Idaho 656, 659-61, 201 P.3d 629, 632-34(2006); I.C. § 5-219. "[T]here must be objective proof that would support the existence of some actual damage. Id. at 634. The circumstances of damages must be decided on a case by case basis. Id. at 635. Mere knowledge of any attorney's negligence does not cause a legal malpractice claim to accrue, rather, the client must sustain damage. *Grunwald v. Bronkesh*, 621 A.2d 459 (1993).

The first time object proof was ascertained that Reed Taylor had incurred some damages was when the court ruled the redemption agreements were illegal and unenforceable on June 17, 2009. (Facts, § L.) Until this time, there has been no objective proof that Reed Taylor was damaged as a result of the illegality of the transaction to redeem his shares. *See Treasure Valley Bank v. Killen & Pittenger, P.A.*, 112 Idaho 357, 732 P.2d 326 (1987)(date bankruptcy court approved the reorganization plan and debtor lost his right to make a claim); *Webster v. Hoopes*, 126 Idaho 96, 878 P.2d 795 (1994) (attorney malpractice action accrued on date summary judgment was entered in underlying foreclosure action); *Olds v. Donnelly*, 696 A.2d 633, 640 (N.J. 1997).

The defendants have failed to put forth any objective proof that Reed Taylor was damaged in 1995 or 1996 as they assert. In 1995 and 1996 Reed Taylor had, or so he believed and Riley warranted, valid and enforceable agreements. (Facts, §§A-K.) The fact that Reed Taylor sold his shares or placed AIA Services in default in 1996 is immaterial for purposes of ascertaining when he had objective damages pertaining to the redemption of his shares. Defendants cite to a recent affidavit of Reed Taylor wherein he testified regarding the many years that had been lost to him. He was merely testifying why the court should have enforced the redemption agreements in *Taylor v. AIA Services, et al.* With respect to the defaults in 1996, AIA Services and Riley's response letter fail to mention or address any illegality and the parties restructured the redemption agreements thereby leaving Reed Taylor's extensive security interests intact. (Facts, §G.) Finally, defendants assert that Reed Taylor was damaged when his $6M Note matured. However, there is no connection between when his $6M Note matured and when he ascertained that his redemption agreements were illegal and unenforceable. In fact, he continued receiving hundreds of thousands of dollars in monthly payments after his $6M Note mature on August 1, 2005. (Facts, I; 2/17/10 Bond Aff., Ex. 6.)

With respect to fraudulent concealment under I.C. § 5-219(4), the evidence demonstrates that Riley and the other defendants concealed facts from Reed Taylor. (Facts, §§A-N.) Defendants provided Reed Taylor the Opinion Letter in 1995. (Facts, §D.) In 1996, Reed Taylor placed AIA Services in default of its contractual obligations owed to him. (Facts, §G.) Riley responded to Reed Taylor's default notices and did not mention or address the legality of the redemption of his shares. *(Id.)* Finally, Reed Taylor testified that neither Riley nor anyone else at Eberle Berlin has ever advised him the redemption was illegal from 1995 to the present time. (Facts, §§A-N; 2/2/10 Taylor Aff., ¶¶2-16.) There is no issue of fact as to the defendants' fraudulent concealment of facts. Reed Taylor had a professional relationship with Riley, Turnbow and Eberle Berlin by and through the Opinion Letter and as them acting as his personal attorneys. The fact that Connie Taylor raised the illegality in 2008 is irrelevant. She raised the issue as to insufficient earned surplus and did not even raise the issue of shareholder approval to invade capital surplus. *See* I.C. § 30-1-6 (1995). Moreover, as the shareholders had approved the redemption of Reed Taylor's shares, he had no reason to believe that anything illegal had transpired and this understanding was affirmatively supported by the Opinion Letter. (Facts, §§A-D.)

As such, their Motion for Summary Judgment should be denied and summary judgment issued in favor of Reed Taylor striking I.C. § 5-219(4) as a defense and finding that the defendants have fraudulently concealed information from Reed Taylor.

E. Reed Taylor's negligent misrepresentation and breach of fiduciary duties claim are not barred by I.C. § 5-224.

Negligent misrepresentation claims, like traditional malpractice, accrue when there is some damage. *Mack Financial Corp. v. Smith*, 111 Idaho 8, 10, 720 P.2d 191, 193 (1986). Based upon the circumstances in this case, the negligent misrepresentations claim should be governed by I.C. § 5-218, I.C. § 5-216 or I.C. § 5-224. However, like *Mack*, it is unnecessary for the court to

make this determination since the claims for negligent misrepresentations accrued on June 17, 2009, and the breach of fiduciary duty claims accrued well within the last four years as well. (Facts, §L.)

In addition to traditional breaches of fiduciary duties, Riley has breached fiduciary duties of undivided loyalty owed to Reed Taylor by and through successfully assisting Hawley Troxell in obtaining an order finding the redemption agreements illegal and taking such other acts set forth in the Complaint and as asserted as facts in these motions. (Facts, §§A-N.) Moreover, Riley and Hawley Troxell have collectively assisted other defendants by thwarting discovery in *Taylor v. AIA Services, et al,* and by filing motions against the Opinion Letter and Riley's former clients. (See also Reed Taylor's Memorandum in Support of Partial Summary Judgment, pp. 14-16.) These claims all accrued since Reed Taylor filed his Complaint in *Taylor v. AIA Services, et al,* and all are within the applicable four-year statute of limitations. Thus, summary judgment should be denied for Riley and Hawley Troxell and the court should grant Reed Taylor summary judgment and strike I.C. § 5-224 as a defense in this action

F. Summary judgment should be granted in favor of Reed Taylor on the negligent misrepresentation claim.

Idaho, like many other states, has recognized the tort of negligent misrepresentations against professionals when a special relationship exists or the occurrence of unique circumstances requires a different allocation of risk. *Nelson v. Anderson Lumber Co.,* 140 Idaho 702, 710, 99 P.3d 1092, 1100 (Ct. App. 2004); *Duffin v. Idaho Crop Improvement Ass'n,* 126 Idaho 1002, 1007-08, 895 P.2d 1195, 1200-01 (1995). Although negligent misrepresentation claims were previously limited to accountants in Idaho, the tort has been implicitly clarified in recent years to apply in circumstances where there is a "special relationship" pertaining to services provided by professionals *such as attorneys,* engineers, physicians, insurance agents and architects. *Nelson,* 140 Idaho at 710 (emphasis added).

States that have recognized the tort of negligent misrepresentation against professionals (like Idaho), first recognized the tort as one that may be brought against accountants, but the law in these states evolved to also permit the tort to be asserted against attorneys. See e.g., *Prudential Insurance Company of America v. Dewey, Ballantine, Bushby, Palmer & Wood,* 605 N.E.2d 318, 320 (N.Y. 1992) ("there is no reason to arbitrarily limit the potential liable defendants to [accountants]"); *Crossland Savings Bank FSB v. Rockwood Insurance Company,* 700 F. Supp. 1274 (N.Y. 1988); *Greycas, Inc. v. Proud,* 826 F.2d 1560 (7th Cir. 1987). To prove negligent misrepresentation based upon an attorney's opinion letter, a plaintiff must show:

> (1) attorney was aware that opinion was to be used for a particular purpose; (2) opinion was relied upon in furtherance of that purpose; (3) attorney was aware of the reliance; (4) opinion contained misrepresentation; and (5) plaintiff suffered damages as a result of its reliance upon misrepresentation.

Finova Capital Corporation v. Berger, 18 A.D.3d 256, 379-81 (N.Y. 2005); *see also Walco Investments, Inc. v. Thenen,* 881 F.Supp. 1576 (D.C. Florida 1995); *Prudential Insurance Company of America v. Dewey, Ballantine, Bushby, Palmer & Wood,* 605 N.E.2d 318 (N.Y. 1992); *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz,* 128 Cal.Rptr. 901, 906 (Cal. 1976); see also Restatement (Second) of Torts § 552 (1977).

Reed Taylor has proven, as a matter of law, that the Opinion Letter contains negligently misrepresented facts and opinions. (Facts, §§D, L and N; Complaint.) Eberle Berlin, Riley and Turnbow were aware that their opinions and representations were to be used and relied upon by Reed Taylor for the purpose of redeeming his shares in 1995. (Facts, §D.) These opinions and representations include those set forth in the Opinion Letter and those made by Riley at various meetings of AIA Services' Board of Directors. (Facts, §§C and N.) Reed Taylor relied upon the opinions and representations and Eberle Berlin, Riley and Turnbow were aware of his reliance, and, in fact, expressly invited his reliance. (Facts, §D.) Significantly, Eberle Berlin, Riley and Turnbow expressly stated that "*[t]his opinion is furnished solely for your benefit...it may not be...relied upon by any other person.*" (Id.; 2/2/10 Taylor Aff., Ex. A, p. 5.) Their representations and opinions contained misrepresentations as determined by the district court in Taylor v. AIA Services, et al. (Facts, §L; 12/3/09 Babbitt Aff., Ex. J.) Reed Taylor has suffered damages

as his $6 Million Promissory Note (plus accrued interest of over $2.5 Million) and other contractual rights have been ruled illegal and unenforceable. (Facts, §N; 2/2/10 Taylor Aff., Ex. D; 12/3/09 Babbitt Aff., Ex. J.)

The defendants' Motion for Summary Judgment to dismiss Reed Taylor's negligent misrepresentation claim should be denied and partial summary judgment should be granted in favor of Reed Taylor on this claim on the issue of liability.

G. Reed Taylor has standing to assert Consumer Protection Act claims, he is elderly during relevant time periods, and the claims are not barred by I.C. § 48-619.

1. Reed Taylor has standing to pursue CPA claims.

First, Reed Taylor purchased services from Eberle Berlin, Riley and Turnbow. As consideration for the redemption of his shares, AIA Services contracted with Reed Taylor to have Eberle Berlin, Riley and Turnbow to draft and deliver "[a] opinion of Company's legal counsel substantially in the form of Exhibit G hereto." (11/24/09 Riley Aff., Ex. A, p. 4, §2.5(j).) In other words, but for Reed Taylor's agreement to sell his shares, Eberle Berlin, Riley and Turnbow would have never been paid to draft and deliver the Opinion Letter to him. Contrary to the defendants' assertions, the Opinion Letter was drafted and delivered expressly for Reed Taylor and not for AIA Services.

Regardless, as noted above, the defendants are estopped from denying an attorney-client relationship with Reed Taylor. When an attorney delivers an opinion to a third party at the request of his client, privity is established as a matter of law. *Finova Capital Corporation,* 18 A.D.3d at 257; *RTC Mortgage Trust 1994 N-1,* 58 F.Supp.2d at 521. When a lawyer represents that he is acting on the third party's behalf, the attorney is estopped from denying the attorney-client relationship and may be held liable for breach of fiduciary duty or negligence. Crossland *Savings Bank FSB v. Rockwood Insurance Company,* 700 F. Supp. 1274 (N.Y. 1988); *Cohen v. Godfriend,* 665 F.Supp. 152,158 (E.D. N.Y. 1987).

Thus, Reed Taylor was a consumer and the consideration from the sale of his shares paid for the legal services the defendants providing drafting and delivering the Opinion Letter. He had an express contract provision to have the Opinion Letter provided to him. Moreover, the letter itself is a contract full of representations and warranties. (2/2/10 Taylor Aff., Ex. A; Facts, §D.) In addition, the defendants were Reed Taylor's personal attorneys at that time. (Facts, §E.) Finally, the defendants are, as a matter of law, estopped from denying an attorney-client relationship with Reed Taylor.

2. Reed Taylor is an elderly person for purposes of his CPA claims.

Reed Taylor's CPA claim accrued on June 17, 2009. At that time, he was 72-years-old, well over the 62-year-old minimum age to qualify for exemplary damages under the CPA. The defendants knew the sale of his stock was his retirement and new that he was **elderly**, or would be **elderly**, and subject to the loss of his retirement. The only relevant issue is Reed Taylor's age when his CPA claims accrued. His age when the Opinion Letter was drafted and delivered is irrelevant. As discussed in Reed Taylor's Motion for Partial Summary Judgment, Riley and Hawley Troxell's intentional and malicious actions with regard to successfully asserting the redemption was illegal in violation of their fiduciary duties owed to Reed Taylor explains and supports exactly why the CPA has exemplary damages and why they should be imposed upon the defendants in this action. Based upon the defendants' unlawful acts (as asserted in Reed Taylor's Motion for Partial Summary Judgment), the court should deny the defendants Motion for Summary Judgment and enter an order finding that Reed Taylor qualifies for exemplary damages under the CPA.

3. Reed Taylor's CPA claims are not time barred.

An action under Idaho's Consumer Protection Act must be brought within "two (2) years after the cause of action accrues." I.C. § 48-619.

Like Reed Taylor's other claims, this cause of action did not accrue until, at the earliest, June 17, 2009. (Facts, §L.) Until that date, Reed Taylor could not assert fraud, deceit or any other basis for CPA claims based upon the illegality of the redemption of his shares. Defendants assert that Reed Taylor was damaged on August 1, 2005, but, again, the maturity date of Reed Taylor's $6M Note has no relevancy to the CPA claims asserted in this action. As his CPA claim accrued on June 17, 2009, the defendants' Motion for Summary Judgment should be denied and summary judgment entered in favor of Reed Taylor striking I.C. § 48-619 as an affirmative defense.

H. Opinions can be the basis of fraud claims, and, regardless, Riley, Turnbow and Eberle Berlin made representations of fact as well.

Generally, opinions and predictions cannot form the basis of a fraud claim, however, an exception exists where a false prediction or opinion is given with the intent to mislead. *Country Cove Development, Inc. v. May*, 143 Idaho 595, 601, 150 P.3d 288, 294 (2006); 37 Am.Jur.2d Fraud and Deceit § 73 (2009); 37 Am.Jur.2d Fraud and Deceit § 70 (2009) ("Stated otherwise, the general rule that the expression of an opinion cannot constitute fraud does not apply if in addition to expressing an opinion, material facts have been fraudulently concealed."); 26 Williston on Contracts § 69:6 (4th Ed. 2009) ("There is a growing unwillingness on the part of Courts in dealing with fraud as well as with warranty to allow statements to be made without liability, which are calculated to induce, and do induce, action on the part of the hearer"); 37 Am.Jur.2d Fraud and Deceit § 71 (2009) ("Hence, the rule is that if the person expressing the opinion possesses superior knowledge, and it is a justifiable conclusion that he or she intended untruly to imply knowledge of facts such as would justify the opinion, the opinion may be regarded in law as an assertion of fact..."). This principal also holds true for opinions given when the person is aware that the facts are incompatible with the opinion, and the opinion may constitute a false statement of fact if made with the intention of deceiving or misleading. *Id.*

In this action, Eberle Berlin, Riley and Turnbow made substantial and material representations of fact and law to Reed Taylor through the Opinion Letter, including, without limitation, that all shareholder consents had been obtained, that the redemption agreements did not violate Idaho law, that Reed Taylor had valid and perfected security interests in the shares of AIA Services' operating subsidiaries, that AIA Services had the power and authority to enter into the transaction, and other material representations. (2/2/10 Taylor Aff., Ex. A; Facts, §D.) These representations are actionable, as a matter of law, and the court should deny the defendants' Motion for Summary Judgment and grant summary judgment to Reed Taylor striking this defense.

I. Reed Taylor's fraud claim is not barred by I.C. § 5-218(4).

The statute of limitations for a fraud and constructive fraud claim does not accrue "until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." I.C. § 5-218. An action against an attorney for fraud or deceit is covered by the statute of limitations for fraud. McCoy v. Lyons, 120 Idaho 765, 820 P.2d 360 (1991).

Here, Reed Taylor believed his redemption was properly approved by AIA Services shareholders and he had an Opinion Letter from a prestigious law firm. (2/2/10 Taylor Aff., ¶¶2-16; Facts, §§A-F.) He had no reason to be placed on notice of anything other than the transaction was legal and backed by a group of well respected attorneys from Boise, Idaho. (Facts, §§A-E.) The defendants incorrectly argue that Reed Taylor was the President of AIA Services, when in fact he merely held an honorary position of C.E.O., which had no powers under AIA Services' Restated Bylaws, i.e., C.E.O. is not even an authorized officer under the Restated Bylaws. (Facts, §A; 2/17/10 Bond Aff, Ex. 25.) In addition, Reed Taylor had little knowledge of legal or financial affairs of the corporation and had delegated those duties to his brother, who was an attorney and an accountant. (Facts, §A.) The defendants also mistakenly rely sole upon the issue of insufficient earned surplus, instead of shareholder approval for capital surplus. In addition, the defendants' assertions regarding Reed Taylor allegedly being in a position where he should have discovered the fraud long ago reflects right back on the defendants, who were the attorneys for the redemption. Moreover, they acts as though Reed Taylor was responsible for ensuring the legality of the redemption and ascertaining knowledge of

the legality, while not addressing the fact that they were the attorneys who represented the parties and drafted and delivered the Opinion Letter.

The first time Reed Taylor had any knowledge that AIA Services should have had shareholders vote to approve a specific shareholder resolution approving the redemption of his shares from capital surplus was when Judge Brudie entered his order finding the redemption agreements illegal and unenforceable on June 17, 2009. [2] (Facts, §L.) Moreover, Reed Taylor attempted to discovery more facts, but his efforts to conduct discovery were thwarted by the defendants in this action. (Facts, §J.) Thus, the defendants' Motion for Summary Judgment should be denied and summary judgment entered in Reed Taylor's favor striking I.C. §5-218(4) as a defense in this action.

J. The defendants are equitably estopped from asserting statute of limitations defenses.

The elements of equitable estoppel are:

> (1) a false representation or concealment of a material fact with actual or constructive knowledge of the truth; (2) the party asserting estoppel did not know or could not discover the truth; (3) the false representation or concealment was made with the intent that it be relied upon; and (4) the person to whom the facts were concealed, relied and acted upon the representation or concealment to his prejudice.

Anderson v. Anderson, Kaufman, Ringert and Clark, Chartered, 116 Idaho 359, 364, 775 P.2d 1201,1206(1989).

Here, the court need not consider any of the defendants' statute of limitations arguments since all of the elements of equitable estoppel are present and easily proven in this action. [3] Eberle Berlin, Turnbow and Riley made false representations of fact and law to Reed Taylor in the Opinion Letter that the redemption of his shares was legal, the agreements enforceable, that all necessary shareholder consents had been obtained and other material misrepresentations. (2/2/10 Taylor Aff., Ex. A; Facts, §D.) Reed Taylor did not know nor could he discover the truth. (2/2/10 Taylor Aff.,¶¶2-16.) The Opinion Letter itself states that it is being furnished for Reed Taylor to rely upon and he, and Scott Bell, testified that he relied upon the representations in the Opinion Letter. (2/2/10 Taylor Aff., Ex. A, p. 5; 2/17/10 Bond Aff., Ex. 22, ¶10; Facts, §D.) Interestingly, the defendants have never offered an explanation of any kind for the finding of illegality and the unenforceability of the redemption agreements. Nevertheless, summary judgment should be entered for Reed Taylor barring Riley, Eberle Berlin and Turnbow from asserting any statutes of limitations pursuant to equitable estoppel.

K. To the extent that the court believes any of Reed Taylor's claims are barred by the statute of limitations, he asserts that the statutes should be equitably tolled.

"[U]nder the doctrine of equitable tolling, the statute of limitations does not begin to run until the plaintiff either acquires actual knowledge of the facts that comprise the cause of action or should have acquired such knowledge through the exercise of reasonable diligence after being apprised of sufficient facts to put him or her on notice." 51 Am.Jur.2d Limitation of Actions § 178 (2009). With the significant facts implying a cover-up and/or concealment of facts, this case is ripe for equitable tolling, to the extent that the court believes any claims are barred. (Facts, §§A-N.) Thus, the court should equitably toll any statutes of limitations which have run, although no actions have accrued until June 17, 2009.

III. CONCLUSION

For the reasons articulated above, the Court should deny Eberle Berlin, Riley and Turnbow's Motion for Summary Judgment and enter judgment for Reed Taylor striking their statutes of limitations defenses and entering judgment in Reed Taylor's favor on their issues.

DATED this 18th day of February, 2010.

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Footnotes

1 On page 17 of their Memorandum, the defendants incorrectly assert that Idaho does not recognize the futility exception and completely disregard well settled Idaho law regarding a shareholder's right to pursue direct actions.

2 Under the terms of I.C. § 30-1-6 (1995), it appears that a layman such as Reed Taylor would easily believe that there were no issues pertaining to his redemption as the board of directors could redeem shares up to the amount of earned surplus, while they could redeem shares in excess of earned surplus upon the vote of the shareholders. Reed Taylor would have no reason to believe that a specific shareholder resolution was required to approve the use of capital surplus to redeem his shares. He was not an attorney and not sophisticated in legal transactions, as was Eberle Berlin, Riley and Turnbow.

3 To the extent the defendants come forward with any evidence disputing the equitable estoppel argument, then Reed Taylor requests a Rule 56(f) continuance to depose Riley and Turnbow as their deposition testimony will show that they had actual or constructive knowledge of the truth that no shareholder resolution was obtained expressly authorizing the payments to Reed Taylor from capital surplus as provided in I.C. § 30-1-6 (1995) and that the false representation was made with the intent that Reed Taylor would rely upon it.